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Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 110

LYNN PORTER, PETITIONER,

versus

JOHN P. ASHMORE, JR., GREENVILLE COUNTY SUPERVISOR, A. C. THOMPSON, GREENVILLE COUNTY JAILOR, WILLIAM D. LEEKE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THE STATE OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court (App. of Petition at 21) is reported at 298 F. Supp. 951. The opinion of the Court of Appeals for the Fourth Circuit (App. of Petition at 32) has yet to be reported. The opinion of the Supreme Court of South Carolina is reported at 251 S. C. 393, 162 S. E. (2d) 843.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether or not the search for and seizure of gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should be sustained as a search and seizure properly made incidental to and contemporaneously with a lawful arrest?

2. Whether or not the search for and seizure of gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should be sustained because the petitioner knowingly and intelligently consented to that search and seizure.

STATEMENT

The petitioner was tried and convicted upon an indictment which charged him with having violated Section 16-515(2) of the South Carolina Code of Laws, a statute which renders it unlawful for one to occupy in South Carolina a building within which there is contained gambling paraphernalia.[1] His conviction was affirmed by the Supreme Court of South Carolina, *State v. Porter,* 251 S. C. 393, 162 S. E. (2d) 843 (1968), and this Court subsequently denied *certiorari. Porter v. State of South Carolina,* 393 U. S. 1079 (1969). On April 14, 1969, however, the United States District Court for the District of South Carolina, Columbia Division, following a hearing upon a writ of *habeas corpus,* declared the search for and seizure of gambling parapher-

[1] "Any person within this State who:

* * *

"(2) Keeps or occupies any room, shed, tenement, booth, building, float, or vessell, or any part thereof, or occupies any place or stand of any kind upon any public or private grounds within this State with books, papers, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools;

* * *

"Shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding six months, or both fine and imprisonment, in the discretion of the Court." CODE OF LAWS OF SOUTH CAROLINA § 16-515(2) 1962).

nalia by law enforcement officers from the petitioner's home unlawful. *Porter v. Ashmore,* 298 F. Supp. 951 (D. C. S. C. 1969). Porter's conviction was set aside by the District Court, and the respondents appealed. That appeal resulted in a reversal by the United States Court of Appeals for the Fourth Circuit of the District Court's order. *Porter v. Ashmore, et al.,* ... F. (2d) ... (4th Cir. 1970). Porter, for a second time, petitioned this Court for a writ of *certiorari.*

In its decision that reverses the United States District Court's order, the Circuit Court summarizes most of the facts which are involved in this case. *Viz.*:

> "Ted M. Owens, an agent with the South Carolina Law Enforcement Division, was assigned to investigate gambling activity in Greenville County, South Carolina, on August 24, 1965. He testified at Porter's trial that he received, from a 'reliable source,' the telephone number of a party accepting bets on baseball and football games. He called the number and began placing bets with the party who answered; on the stand he identified the voice on the phone as that of Lynn Porter. Owens made wagers on a weekly basis with Porter through December 1965, usually placing the bets by phone and leaving the money bet at the desk of the Imperial 400 motel. Someone, inferentially Porter, would later pick up the money at the motel.
>
> "On December 29, 1965, Owens received information that Porter had gambling paraphernalia and parlay cards at his home. He then signed an arrest warrant for Porter and proceeded, with four other officers, to Porter's residence. According to the officers, Mrs. Porter answered the officers' knock at the door by pushing it open slightly. Seeing the police outside, she shut the door and went away. Porter himself then came to the door and asked whether the officers had a search warrant. They told him they had an arrest warrant, and Porter opened the door. The police stepped in and read the warrant to him. Lieutenant Coleman, one of the officers present, then told Porter that he wanted to look

around, to which Porter is said to have replied, 'Go ahead,' or 'Help yourself.' The police then searched the premises. In a basement room some distance from the point of the arrest they found a phone with four or five incoming lines, some parlay cards, dice, playing cards, and 'odds' books. The parlay cards and odds books were introduced at Porter's trial.

"While the police were at the Porter residence, Mrs. Porter requested that she be allowed to take her children and go to a neighbor's house. Before she left, however, the officers asked her whether she had any parlay cards, or other gambling equipment in her purse. She replied by offering to hand over her bag, but one of the police told her to open it instead. When she complied, the officer noticed a billfold inside and asked if there was money in it. Mrs. Porter took out $105 and gave it to the police, who told her they would have to hold the money until they could determine whether it was cash mailed to Porter by Owens. They subsequently confirmed, by an examination of the serial numbers, that part of the money had been sent to Porter on a 'bet' placed by Owens. This money was also introduced at the trial." (App. of Petition at 33-34); compare, *State v. Porter, supra* at 397-399.

The respondents would add that at the time of Porter's arrest and the search of his home there was no statute in South Carolina that would have authorized the arresting officers to obtain a search warrant for gambling paraphernalia. (App. of Petition at 37); Code of Laws of South Carolina § 17-271 (1962), as amended (1968 Supp.); 54 STAT. Act No. 908 § 1 at 2268-2269 (1966).

Porter contends, as before, when he, upon basically the same record, petitioned this Court for a writ of *certiorari* directed to the Supreme Court of South Carolina, *Porter v. State of South Carolina,* 393 U. S. 1079 (1969), that the search of his home and the seizure of the gambling paraphernalia contained therein were unconstitutional. He main-

tains now, as then, that the search for and seizure of the gambling equipment and related articles by law enforcement officers from his home without a search warrant were invalid, even though made contemporaneously with and incidental to his lawful arrest. He further maintains now, as then, that at no time did he consent to that search and seizure.

ARGUMENT

I.

The search for and seizure of gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should be sustained as a search and seizure properly made incidental to and contemporaneously with a lawful arrest.

Incidental to and contemporaneously with the lawful arrest of the petitioner in his living room (App. at 32), a search was made of those premises upon which he was arrested and as to which he had possession and control. The search did not extend beyond the dwelling; and while it appears that Porter's whole house was searched, it was just from the dwelling's den in the basement and an adjacent room that the gambling things were seized. (App. at 21-22). Unless this case is controlled by *Chimel v. California,* ... U. S. ..., 23 L. Ed. (2d) 685 (1969), and another case decided with it that day, the constitutional validity of that search and seizure must be determined in accordance with the rule prescribed by this Court in *Harris v. United States,* 331 U. S. 145 (1947), and in *United States v. Rabinowitz,* 339 U. S. 56 (1950), a rule which prevailed on December 31, 1965, the date that the petitioner was arrested and his house searched. (App. at 13.)

The latter cases established the rule that the validity of a search made without a search warrant but incidental

to a lawful arrest depended upon the reasonableness of the search under all the circumstances. *E.g.*:

> "[T]here may be reasonable searches incident to an arrest without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances." *United States v. Rabinowitz, supra* at 65-66.

The Circuit Court concluded that the following facts and circumstances rendered the search in this case reasonable and, therefore, valid:

> "(1) The officers were conducting a search for specific e v i d e n c e (gambling paraphernalia, parlay cards, and bills with particular serial numbers), not a general exploratory search with no definite aim in mind; (2) the search and seizure were incident to a lawful arrest, based on probable cause developed after extensive investigation; (3) there was, at the time of the arrest and search, no South Carolina statute authorizing the officers to obtain a search warrant for gambling paraphernalia; (4) if the officers had not conducted the search, there was good reason to fear that the evidence would have been destroyed or concealed. Indeed, since the officers could not obtain a search warrant for the items there would have been no method available to obtain the incriminating evidence; (5) finally, occupying a house containing gambling paraphernalia was the very crime for which Porter was being arrested, and, as a result, a search for gambling paraphernalia within the house was entirely reasonable." (App. of Petition at 37.)

Other facts and circumstances which, it is submitted, made the search and seizure in this case reasonable and, hence, constitutional were: (1) the dwelling wherein the search was conducted and the seizure was made was under the petitioner's immediate control and was in his posses-

sion; (2) the search did not extend beyond the dwelling which was used for unlawful purposes and inside of which Porter was arrested (App. at 21-22); (3) the place of the search and seizure was a dwelling in which there lived others besides the petitioner and who, it is reasonable to assume, could have destroyed the gambling paraphernalia while Porter was in police custody, if not to aid him, then to avoid prosecution for having committed the same offense (App. at 32); (4) all items seized, except the money which was obtained from Porter's wife, were taken from the basement area of Porter's house (App. at 32); (5) the officers had a valid arrest warrant in their possession (App. at 15); and (6) the officers acted in good faith in accordance with their understanding of existing law (App. at 12).

We are aware, however, that *Von Cleef v. New Jersey*, ... U. S. ..., 23 L. Ed. (2d) 728 (1969), was also decided on June 23, 1969. Von Cleef was arrested on the third floor of a sixteen-room house in which she and her co-petitioner lived. Several policemen proceeded to search the entire house without a search warrant. The search took three hours [2] and yielded several thousand articles, letters, photographs, and other things which were later introduced in evidence by the prosecution. As it reversed the petitioners' convictions, this Court ruled:

> "[T]he action of the police here in combing a three-story 16-room house from top to bottom and carting away several thousand papers, publications, and other items cannot . . . be justified as 'incident to arrest.'" 23 L. Ed. (2d) at 731.

As authority for its holding in *Von Cleef*, this Court cited *Kremen v. United States*, 353 U. S. 346 (1957) and referred to *Abel v. United States*, 362 U. S. 217 (1960), a case in which the latter decision was commented upon and

[2] The search involved in *Harris v. United States*, *supra*, however, took approximately five hours. See, 331 U. S. at 149.

distinguished. In *Kremen,* agents of the Federal Bureau of Investigation, without a search warrant in their possession, made an exhaustive search of the cabin in which Kremen had shortly before been arrested and seized the cabin's entire contents. That search and seizure were regarded by this Court as beyond the sanction of any of its cases. The convictions of Kremen and the other petitioners were, therefore, set aside.

The facts that were involved in *Von Cleef,* while generally similar to those involved in *Kremen,* on close examination, differ considerably. Mr. Justice Harlan's dissent in *Von Cleef* makes that clear. See, 23 L. Ed. (2d) at 731. We can find no other decision of this Court which holds that where an abundance of relevant evidence is seized without a search warrant but pursuant to a lawful arrest and contemporaneously therewith, such evidence is illegally obtained and cannot be admitted in evidence. Cf. *Von Cleef v. New Jersey, supra* (Harlan, J. dissenting); *Shipley v. California,* ... U. S. ..., 23 L. Ed. (2d) 732 1969), (White, J. dissenting); *Matthews v. United States,* 407 F. (2d) 1371 (5th Cir. 1969). Since *Von Cleef* establishes, we believe, a new evidentiary exclusionary rule, that rule should not be applied here unless, like *Chimel,* it is to receive retrospective application.

The facts involved in the instant case and in *Kremen* are, respondents admit, similar in a few respects. In both cases, there was a seizure of a substantial quantity of items. In both cases, the arrest of each petitioner was lawful. In both cases, a dwelling house was the place in which each petitioner was arrested and in which the articles seized were found after a warrantless search. There are, however, some distinctions.

In *Kremen,* the officers made an indiscriminate search for evidence and seized the entire contents of the cabin in which they made their search. Here, the officers searched

for and seized only relevant evidence. In *Kremen*, all occupants of the cabin were arrested; but in this case only Porter, of all the occupants, was taken into custody. Thus, unlike the situation presented in *Kremen*, there was a possibility here that the evidence contained in the Porter dwelling would have been disposed of had it not been immediately seized by the officer upon the petitioner's arrest.

As was noted above, we regard the rule which this Court established in the *Von Cleef* case as a new evidentiary exclusionary rule because, in that case, this Court held for the first time that a seizure without a search warrant of an abundance of relevant evidence as an incident to a lawful arrest is unconstitutional; therefore, if *Von Cleef* is to be applied retrospectively, distinctions between its facts and those of this case should also be made. In *Von Cleef*, the petitioners, among other things, were charged with maintaining a building for purposes of lewdness and permitting a building to be used for purposes of lewdness. Apparently, the mere occupation of a building in which lewdness was permitted is not a crime under New Jersey law; however, in this case, the mere occupation of a building containing gambling paraphernalia is so under South Carolina law. In *Von Cleef*, as in *Kremen*, all occupants were taken into custody while in this case, as was mentioned, only Porter, who was not the sole occupant of the dwelling, was arrested; and, as we have said, there was a real chance that the gambling apparatus and related articles kept by Porter in his home would have been destroyed had it not then been seized by the police.

Assuming that *Von Cleef* is to be applied retrospectively and that validity of the search and seizure in this case depend upon whether the amount of relevant evidence taken by the officers was an unconstitutional amount, the issue is one that cannot easily be resolved because this Court has never indicated the amount of evidence which it

considers to be an unconstitutional abundance, if seized without a search warrant as an incident to a lawful arrest.

Too, the record in this case is silent as to the amount of time that the search required to complete, the size of the Porter home, as well as the precise number of items seized by the officers. There was no testimony at all concerning these factors offered at the hearing conducted by the District Court (App. at 2), and the trial testimony does not refer to them either. The record merely shows that the officers, upon arresting the petitioner in his living room pursuant to an arrest warrant, went immediately and directly to the basement (App. at 16); and it was from two basement rooms that they gathered a quantity of gambling paraphernalia (App. at 21 and 32), evidence which bore a reasonable relationship to the crime with which Porter was charged and of which he was later convicted.

Because in a *habeas corpus* proceeding the petitioner, in this instance Porter, has the burden of proving by the preponderance of the evidence the alleged violations of his constitutional rights, *Johnson v. Zerbst,* 304 U. S. 458 (1938); *Post v. Boles,* 332 F. (2d) 738 (4th Cir. 1964), this Court should not presume that his home was of such a size, the time spent by the officers in searching it was of such a length, and the articles taken were of such a quantity that the search and seizure in this case were invalid. Rather, this Court should confine itself to the record and base its findings upon the facts and circumstances therein disclosed. In doing so, the test of reasonableness should be employed.

Of course, if the rule established by the *Chimel* case is to be applied retroactively, the search without a warrant of Porter's entire home was invalid and the trial court should not have admitted into evidence, over objection, the gambling paraphernalia which the officers seized in making that search. The Circuit Court held that the *Chimel* holding was to be applied only prospectively, *i. e.,* only to searches

conducted after June 23, 1969, the date *Chimel* was decided. (App. of Petition at 35.) That holding is manifestly correct. Obviously, the exclusion of evidence seized prior to *Chimel* would not serve to deter similar searches and seizures in the future. It would, however, overturn convictions based upon fair reliance on pre-*Chimel* decisions; and it would make greater the burden on the administration of justice. Cf. *Desist v. United States,* 394 U. S. 244 (1969).

The Circuit Court's holding finds support from other jurisdictions in the following cases: *United States v. Bunch,* ... U. S. C. M. A. ..., 6 Cr. L. R. 2452 (1970); *United States v. Blassick,* ... F. (2d) ..., 6 Cr. L. R. 2411 (7th Cir. 1970); *Williams v. United States,* 418 F. (2d) 159 (9th Cir. 1969); *Lyon v. United States,* 416 F. (2d) 91 (5th Cir. 1969); *United States v. Bennett,* 415 F. (2d) 113 (2d Cir. 1969); *Thornton v. State,* ... Tex. ..., 6 Cr. L. R. 2389 (1970); *Derouen v. Sheriff,* ... Nev. ..., 6 Cr. L. R. 2246 (1969); *People v. Herrera,* ... Mich. App. ..., 172 N. W. (2d) 529 (1969); *People v. Edwards,* ... Col. ..., 453 P. (2d) 713 (1969); and *Scott v. State,* 7 Md. App. 505, 256 A. (2d) 384 (1969). See also, *Jordan v. United States,* 416 F. (2d) 338 (9th Cir. 1969), *cert. denied,* ... U. S. ..., 38 L. W. 3320 (1970).

Von Cleef, which, as we see it, also establishes a new evidentiary exclusionary rule, should not be applied retrospectively any more than *Chimel* should; and even if it is, there are, as we have pointed out, material factual differences between *Von Cleef* and the instant case which would preclude its application to the latter.

II.

The search for and seizure of gambling paraphernalia by law enforcement officers from the house of the petitioner without a search warrant should be sustained because the petitioner knowingly and intelligently consented to that search and seizure.

The Circuit Court did not reach the question concerning whether the petitioner consented to the search of his home (App. of Petition at 37), but the United States District Court did (App. of Petition at 25-31); and Porter argues that issue in his petition to this Court. (Petition at 8-16). The District Court held that the petitioner did not consent to the search of his home. (App. of Petition at 31).

As has been mentioned, immediately after Porter was placed under arrest at his home and while confronted by the arresting officers, he was told by one of them that they wanted "to look around." He replied "Go ahead", or "Help yourself." (App. at 15). The trial court and the Supreme Court of South Carolina concluded that the petitioner thereby freely and intelligently consented to the search and that the evidence seized as a result of that search was admissible. Reluctantly, the District Court disagreed and held that Porter did not voluntarily consent to the search of his dwelling and that the articles which that search produced were illegally obtained and should have been excluded from the evidence. In reaching its conclusion, the District Court stated that the burden was upon the State to establish a valid waiver by Porter of his Fourth Amendment protections. Apparently, it did not matter to the District Court that at no time, either at the trial of his case in the state court or at the hearing conducted in the District Court pursuant to the writ of *habeas corpus*, did Porter testify that, when the officers made

known their desire to search his house, he did not freely and understandingly consent to that search in telling the officers to proceed.

About two years ago, the Court to which the petitioner seeks *certiorari*, in *United States v. Vickers*, 387 F. (2d) 703 (4th Cir. 1967), observed:

> "[I]t is well settled that a 'search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search uncontaminated by any duress or coercion, actual or implied.' . . . Whether consent was voluntarily and intelligently given is a question of fact as to which the government has the burden of proof. . . ." 387 F. (2d) at 706.

But, it should be noted, the government, here the State, has the burden only during the original criminal proceeding. It does not have, as the District Court asserted (App. of Petition at 28-29), that burden in a *habeas corpus* action. The petitioner has offered no evidence whatever that his consent to the search was obtained by either duress or coercion. Manifestly, therefore, the petitioner failed to carry the burden which was his. An involuntary consent should not necessarily be presumed simply from the admitted fact that Porter was under arrest at the time that the consent was given. See, Annot., 9 A. L. R. (3d) 858 § 7[a] at 880 (1966).

Nonetheless, whether the consent of one in custody to a search is sufficient or not will depend upon the particular facts and circumstances of each case.

> "[T]here are no hard rules by which the presence of a certain fact (in addition to custody) will bind the court to a particular decision." 9 A. L. R. (3d) at 864.

The District Court did not believe that the petitioner freely consented to the search of his house because he,

moments before his arrest, asked the police if they had a search warrant. As far as the District Court is concerned, Porter allowed the search to take place only because he was under arrest and was in custody. In support of this position, the Court cited *Higgins v. United States*, 209 F. (2d) 819 (D. C. Cir. 1954) (App. of Petition at 28), for the proposition that "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." 209 F. (2d) at 820. Not everyone would agree. *Viz.*:

> "Roche, who did not testify at the hearing on his motion to suppress, points to cases indicating that consent to a search is not to be lightly inferred . . . and argues that since it is incredible he would freely have consented to a search which he knew would disclose incriminating evidence, his words of consent should be considered an involuntary submission to authority and therefore insufficient to waive a constitutional right. Acceptance of this contention would mean that expressions of consent could relieve officers of the need of obtaining a warrant only when the speaker was not aware that the search would disclose damaging evidence—a fact usually not within the officers' knowledge. Such a ruling not only would almost destroy the principle permitting a search on consent but would enable experienced criminals to lay traps for officers who, relying on the words of consent, failed to secure a search warrant that would have been theirs for the asking. Where, as here, no force or deception was either used or threatened, we see no reason why a court should disregard a suspect's expression of consent simply because efficient and lawful investigation and his own attempt to avoid apprehension had produced a situation where he could hardly avoid giving it. . . ." *United States v. Gorman*, 355 F. (2d) 151 at 158 (2d Cir. 1965), *cert. denied*, 384 U. S. 1024 (1966).

The reference in *Gorman* to an absence of force and deception is, we think, of significance. The District Court cites *Judd v. United States*, 190 F. (2d) 649 (D. C. Cir. 1951), as a case which holds that where a defendant is in custody any consent to a search and seizure is necessarily the result of coercion. The factual situation in *Judd* is very much different from that here.

> "[T]he appellant was arrested late at night without a warrant, booked on an open charge for 'investigation', questioned for several hours by various police officers, then taken away, while handcuffed, and in custody of four officers." 190 F. (2d) at 651.

In this case, the petitioner was arrested at about 10:30 a. m. (App. at 13) upon an arrest warrant. He was not questioned at all, and he was not handcuffed. No force whatever was used.

The District Court also speaks of the coercion which is allegedly "implied in situations where consent is obtained under color of badge." (App. of Petition at 29).

On the other hand, it has been said:

> "[P]erhaps there is a coercive effect inherently produced where several police officers, with their uniforms and accompanying paraphernalia, confront a suspect and ask for permission to search. To sustain such a claim of coercion, absent any coercive words or acts by the police, would preclude a voluntary consent to search whenever more than one armed police officer confronts a suspect; it is only their number, their equipment and the fact they are police that appellant claims adds up to coercion. We refuse to so hold." *United States v. Thompson*, 356 F. (2d) 216 at 220 (2nd Cir. 1965).

Where a defendant is either in custody or under formal arrest and consents to a search and seizure, there simply are no established criteria by which to test the vol-

untariness of that consent. Most courts, though, have been hesitant either to require police officers to be clairvoyant or to have them engage in either psychological or physiological inquiries as to the meaningfulness of an invitation. *Robbins v. MacKenzie,* 364 F. (2d) 45 (1st Cir. 1966), *cert. denied,* 385 U. S. 913 (1966). They have also been slow to overturn the factual determinations of the trial and appellate courts when such are brought to them in *habeas corpus* proceedings. Cf. *Wade v. Warden,* 278 F. Supp. 904 (D. C. Md. 1968). The determination by the trial court and the Supmeme Court of South Carolina that Porter freely and intelligently consented to the search of his house should, we submit, be respected, especially since Porter never chose to rebut that finding by testifying concerning it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Porter's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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